

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 97B067

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

EDWARD J. GRZECHOWIAK,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO TERRITORIAL CORRECTIONAL FACILITY,

Respondent.

Hearing was held on April 18 and 29, 1997 before Administrative Law Judge Robert W. Thompson, Jr. Respondent appeared through Mark McKinna and was represented by Ceri Williams, Assistant Attorney General. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent called five witnesses: Steve McLaury, DOC Investigator; Larry Todd, DOC Captain; Dolly Porter and Kevin Mitchell, DOC Correctional Officers; and Mark McKinna, Superintendent, Colorado Territorial Correctional Facility. Complainant testified on his own behalf and called no other witnesses.

Respondent's Exhibits 1 through 5 and 9 were stipulated into evidence. Exhibits 6, 7 and 8 were admitted over objection. Exhibit 7A was not admitted. Exhibit 10 was not offered. Complainant did not proffer any exhibits.

MATTER APPEALED

Complainant appeals the disciplinary termination of his employment.

ISSUES

1. Whether complainant committed the acts for which discipline was imposed;

2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

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3. Whether respondent's action was arbitrary, capricious or contrary to rule or law;

4. Whether the R8-3-3 meeting was properly conducted;

5. Whether the discipline was imposed by a properly delegated appointing authority;

6. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

On May 13, 1997, the administrative law judge was hospitalized and subsequently entered into an extended period of sick leave. A case status conference was held on June 10, 1997 before Judge Margot Jones. The parties stated their desire to have the initial decision issued by the original judge and, accordingly, waived any challenges to the timeliness of the initial decision.

Evidence of the result of a polygraph examination was ruled *per se* inadmissible in these proceedings as insufficiently reliable, even if relied upon by the appointing authority in making his decision regarding discipline. Additionally, under the facts of this case, the proffered polygraph evidence was found inadmissible because the proper foundation was lacking as to the qualifications of the operator and the certification of the machine. See, e.g., *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Hutton*, 831 P.2d 486 (Colo. 1992).

FINDINGS OF FACT

1. Complainant, Edward Grzechowiak, became employed by respondent, Department of Corrections (DOC), as a correctional officer in April 1987. He was assigned to the Colorado Territorial Correctional Facility (CTCF) in the Canon Region on July 1, 1995. He obtained the rank of seargent.

2. On April 21, 1996, CTCF inmate Cisneros told a correctional officer that he knew where a handcuff key was hidden in the exercise yard and that he would supply the key in exchange for permission to make a telephone call.

3. That evening, Captain Todd ordered that the yard be closed in order to search for the key, considering a missing handcuff key to be a serious security risk.

4. Inmates value their time in the exercise yard and will

generally be disappointed when the yard is closed.

5. At some point, an inmate asked complainant why the yard was being closed. In the presence of other inmates, complainant responded, "Go ask Cisneros."

6. Two days later, on April 23, 1996, Cisneros was assaulted and injured by another inmate, who called Cisneros a "snitch" as he attacked him.

7. By letter dated May 13, 1996, DOC Inspector General Robert Cantwell advised complainant that a complaint had been filed against him alleging staff misconduct and that an investigation regarding the matter would take place. (Exhibit 1.)

8. On August 16, 1996, CTCF Superintendent Mark McKinna sent a letter to Canon Region Director Mary West requesting that he be delegated the appointing authority to hold a predisciplinary meeting with complainant. (Exhibit 2.) West responded in the affirmative on the same day, granting McKinna "full authority to make any final decisions deemed necessary." West did not provide a photocopy of her letter to anyone. (Exhibit 3.)

9. West was delegated the appointing authority for the Canon Region on July 12, 1996, via a letter of delegation from Jerry Gasko, the Acting Deputy Director of Correctional Services and the statutory appointing authority. (Exhibit 4.) In his letter, Gasko directed West as follows:

Accordingly, you are hereby delegated authorities, duties, powers, and responsibilities of "Appointing Authority" for positions assigned under your office. "Appointing Authority" is defined in Colorado State Personnel Rules, with specific reference to Rules, Chapter 1, Article 4. You may further delegate this "Appointing Authority" as you determine necessary for the effective functioning of your office after having obtained my approval. All requests for further delegation must be approved by me. Your approval for the delegation must be in writing to the delegate and I am to be copied.

....

In case you delegate "Appointing Authority" to administer corrective or disciplinary actions pursuant to Chapter 8 of the Colorado State Personnel Rules, you are reminded that partial delegation in such matters is not allowed. The delegee's decision is not subject to your review in corrective or disciplinary actions. Thus, it is recommended by (sic) such delegation, if any, be made on an individual case basis after you have had an opportunity to determine the nature of the case and,

consequently, the level of "Appointing Authority" at which the case should be considered.

10. On the day that he was delegated the requisite appointing authority, August 16, McKinna sent to complainant a notice of the scheduling of a Rule R8-3-3 meeting to discuss "your involvement in an incident which resulted in an assault on inmate Cisneros...." (Exhibit 5.)

11. On November 20, 1996, McKinna terminated complainant's employment, the factual basis being that the assault on inmate Cisneros "may have been precipitated" by complainant's statements in front of other inmates. (Exhibit 8.)

12. The termination letter was routinely copied to eleven sources, including the Deputy Director of Correctional Services. This was not done as a specific effort to inform Jerry Gasko.

13. Complainant filed a timely appeal of the disciplinary action on November 26, 1996.

DISCUSSION

At the close of respondent's case-in-chief, complainant moved for judgment in his favor and an order dismissing the personnel action on grounds that respondent did not establish that Mark McKinna was properly authorized to take the disciplinary action and that there was no proof that Jerry Gasko approved the delegation of authority from West to McKinna. Respondent argued in return that there is a presumption of the regularity of personnel actions and, further, that the delegation was proper because Gasko ratified the disciplinary action. The administrative law judge reserved ruling on the motion until the close of all the evidence.

After a considered review of this issue over a period of time, it is now found that the disciplinary action was not taken by a properly delegated appointing authority, and the action must consequently be rescinded. Since the action is void in the first instance, it is unnecessary and counterproductive to reach a determination of the case on the merits of the factual allegations.

Rule R1-4-2, 4 Code Colo. Reg. 801-1, provides in full:

Delegation. The appointing authority may delegate authority for all personnel functions and actions.

(A) Unless otherwise specified in these rules, such delegation need not be in writing so long as the appointing authority ratifies the action taken. The appointing authority is presumed to have ratified the action taken unless he takes specific action to countermand it within a reasonable period of time.

(B) The delegatee may further delegate authority for personnel actions only if, and to the extent, authorized to do so in writing by the appointing authority. If so authorized, then further delegation shall be governed by subparagraph (A) above.

The partial delegation of appointing authority over disciplinary actions is prohibited by Rule R8-3-3(D)(1)(c), 4 Code Colo. Reg. 801-1, which provides:

Appointing authorities may delegate all responsibilities under this rule. There may not be partial delegation....

The parties agree that Jerry Gasko was the appointing authority from whom the delegation must flow. See Colo. Const. Art. XII, §13(7); §24-50-129, C.R.S. Gasko properly delegated appointing authority to Mary West via a writing which authorized West to further delegate the appointing authority only after obtaining Gasko's approval and instructing West to copy Gasko on any letter of further delegation. These provisions were ignored by West in further delegating the appointing authority to McKinna, directly contravening the provision of R1-4-2(B) requiring further delegation of authority for personnel functions to comply with the extent of the authorization from the appointing authority. Only when that authorization is followed does subparagraph (B) relate to the further delegation being governed by subparagraph (A). Thus, respondent's ratification argument fails in this instance.

Gasko correctly pointed out to West that disciplinary actions are not subject to review. A disciplinary action is not subject to the ratification provision because such would amount to the partial delegation of the appointing authority for personnel actions, prohibited by R8-3-3(D)(1)(c), quoted above.

The ratification clause of R1-4-2 does not permit a violation of the rule to be cured by simply providing the statutory appointing authority with a copy of the ultimate disciplinary letter. This interpretation would go against the spirit of the rule and render the rule without effect.

No part of Gasko's letter indicates that the provisions of the letter may be violated and the violation cured by including Gasko's name on the list of those sent a copy of the disciplinary letter. Nor does Gasko attempt by his letter to reserve for himself the right to countermand the disciplinary action thereby overruling the decision of the delegated appointing authority who had been clothed with authority to impose discipline, a stance which would unjustifiably alter the procedural structure for the imposition of discipline for state employees. West, herself, seems to have recognized this when she granted to McKinna "full authority to make any final decisions deemed necessary."

The record is devoid of evidence that Gasko ratified West's further delegation of authority, or even knew about it. He was not copied on the necessary letter. Nor does the record support a finding that Gasko ratified the disciplinary action, which, as a requirement, would have amounted to a partial delegation of appointing authority because McKinna would have been denied full authority to impose discipline vis-a-vis this complainant. If an act can be ratified, it can be nullified. Ratification should be limited to oral delegation, as the rule provides, because in that circumstance the terms and conditions are not defined.

A disciplinary action taken by someone not lawfully authorized to do so is groundless, frivolous and taken in bad faith. Respondent did not proffer a factually justifiable excuse for its unlawful conduct. Complainant is entitled to an award of attorney fees and costs under §24-50-125.5, C.R.S. of the State Personnel System Act.

Compliance with the subject personnel rules serves the purpose of preserving the integrity of the personnel system and is not burdensome. Compliance with the terms of the appointing authority's delegation letter would have tracked the rules and, in a like manner, would not have been unduly burdensome.

The presumption of the regularity of an agency's daily personnel activities does not apply to this situation, where a particular action was challenged on specific grounds. The burden rests with the agency to prove that the disciplinary action was taken by a lawful authority. This record cannot sustain such a finding. Even if there were a presumption that everything the respondent did was correct, the presumption is rebuttable, not absolute, and was successfully rebutted in this case.

CONCLUSIONS OF LAW

1. In view of the outcome, no finding is made on this issue.
2. In view of the outcome, no finding is made on this issue.
3. Respondent's action was arbitrary, capricious and contrary to rule.
4. The R8-3-3 meeting was not properly conducted because of the lack of a properly delegated appointing authority.
5. The discipline was not imposed by a properly delegated appointing authority.
6. Complainant is entitled to an award of attorney fees and

costs.

ORDER

Respondent's action is rescinded. Complainant is reinstated to his former position with full back pay and benefits from the date of termination. Respondent shall pay to complainant his reasonable attorney fees and costs incurred in pursuing this action.

DATED this _____ day of
July, 1997, at
Denver, Colorado.

Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the _____ day of July, 1997, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf
Attorney at Law
1390 Logan Street, Suite 402
Denver, CO 80203

and in the interagency mail, addressed as follows:

Ceri C. Williams
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
